BEFORE THE HIGH COURT OF JUDICATURE AT MADRAS
DATE : 30.10.2008
CORAM
THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN
C.A.No.532 of 2002
M.N.Rangasamy .. Appellant / Complainant

Vs.

A.Kishnasamy .. Respondent / Accused

Prayer :- This appeal has been preferred under 378 of Cr.P.C., against the judgment dated 29.08.2001 in C.C.No.317 of 1998 on the file of the Court of Judicial Magistrate No.I, Coimbatore.

For Appellant : Mr.V.Nicholas, Advocate
For Respondent : Mrs.Chithra Venkatesan, Advocate

JUDGMENT
This appeal has been preferred against the Judgment in C.C.No.317 of 1998 on the file of the Court of Judicial Magistrate No.1, Coimbatore. The appeal is against acquittal preferred by the complainant.

2.According to the complainant, the accused after borrowing a sum of Rs.5 lakhs from the complainant had drawn the impugned cheque - Ex.P.1 on 1.2.1997, which on presentation before the Andhra Bank on 8.6.1997 was returned with an endorsement 'Account Closed'. Ex.P.2 is the Return Memo issued by the Bank along with the cheque - Ex.P.1. The complainant, thereafter, had issued a notice under the original of Ex.P.3 on 14.06.1998, for which the accused had sent a reply under Ex.P.4 dated 28.6.1998. Ex.P.5 is the statement of accounts relating to the accused maintained in Indian Bank, Devangapet Branch. Hence, for seeking appropriate remedy under Section 138 of the Negotiable Instruments Act, the complainant had approached the trial Court.

3.Before the learned trial Judge, the complainant has examined himself as P.W.1 besides examining one Sheshadri, Branch Manager of the Indian Bank, as P.W.2. On the side of the complainant Ex.P.1 to Ex.P.5 were marked. The accused has examined himself as R.W.1 and on his side Ex.R.1 and Ex.R.2 were marked. After scanning the evidence both oral and documentary the learned trial Judge basing his reliance on a ratio in 1998 Criminal Law Journal 906 (A.Bhoosanrao Vs. Purushothamdas Pantani and another) held that since the complainant has failed to discharge his initial burden that the impugned cheque-Ex.P.1 was drawn by the accused only to discharge a legally subsisting liability, had dismissed the complaint thereby acquitted the accused from the charge under Section 138 of the Negotiable Instruments Act, which necessitated the complainant to prefer this appeal.
4.Heard the learned counsel for the appellant as well as the learned counsel for the respondent and considered their rival submissions.
5.The point for determination in this appeal is whether the impugned cheque-Ex.P.1 was drawn by the accused to discharge a subsisting liability to warrant conviction under Section 138 of the Negotiable Instruments Act?

6.Point:- Section 138 of the Negotiable Instruments Act runs as follows:-
"Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of

money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:
Provided that nothing contained in this section shall apply unless_
(a)the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.
Explanation:-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."
The learned counsel for the appellant relying on 2008(1) CTC 433 (Krishna Janardhan Bhat Vs. Dattatraya G.Hegde), would contend that as per Section 139 of the Negotiable Instruments Act the Court has necessarily to draw the presumption against Ex.P.1 impugned cheque to the effect that it was drawn only to discharge a debt or other liability. Section 139 of the Negotiable Instruments Act reads that "It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in section 138,for the discharge, in whole or in part, of any debt or other liability" So the presumption under Section 139 of the Negotiable Instruments Act is a rebuttable presumption and once the accused is able to prove that the impugned cheque drawn by him in favour of the complainant is not for discharging any subsisting liability or debt, then the Court cannot take a presumption under Section 139 of the Negotiable Instruments Act that the impugned cheque was drawn for consideration. Only if the conditions laid down under Section 138 of the Negotiable Instruments Act have been complied with by the complainant, then only the presumption in favour of him under Section 138 of the Negotiable Instruments Act on the basis of the impugned cheque can be drawn by the Court to hold that the impugned cheque was drawn by the accused to discharge a subsisting liability or debt.
6(a)It is the case of the complainant that the accused had borrowed a sum of Rs.5 lakhs from the complainant on 7.7.1995 and in order to discharge the said loan the accused had drawn Ex.P.1 impugned cheque on 6.6.1997, which on presentation with the bank was dishonoured. Ex.P.4 is the reply notice dated 28.6.1997 issued by the accused to the notice issued by the complainant under the original of Ex.P.3 dated 14.6.1998. In Ex.P.4 reply notice itself the accused has denied having borrowed Rs.5 lakhs from the complainant and that the notice is silent with regard to the mode of disbursement of the said loan of Rs.5 lakhs to the accused. It is the definite case of the accused under Ex.P.4 that the alleged impugned cheque is a fabricated and forged document. It has further been alleged by the accused that the complainant had no sufficient funds to lend Rs.5 lakhs to the accused as alleged in the notice. Now the burden is heavily on the complainant to prove that Ex.P.1 impugned cheque was drawn by the accused only to discharge a subsisting liability or debt. There was no material placed before the trial Court on the side of the complainant as to show when actually the alleged amount of Rs.5 lakhs was disbursed to the accused. If the complainant would have lend Rs.5 lakhs to the accused it is not known what prevented him from obtaining a promissory note or any other secured document for the money lend by him to the accused. In 1998 Criminal Law Journal 906 (A.Bhoosanrao Vs. Purushothamdas Pantani and another) the relevant observation of the learned Judge relevant for the purpose of deciding this case runs as follows:-
"To bring home the guilt of the accused under Section 138 of the Act, the complainant is bound to discharge the initial burden cast upon him that the cheque was given by the accused in discharge of

a legally enforceable liability."
The same view was reiterated by the Honourable Apex Court in 2006(6) SCC 39 (M.S.Narayana Menon @ Mani Vs. State of Kerala and another). The ratio decidendi in the said judgment is as follows:-
"The definite case of the second respondent was that the cheque dated 17.08.1992 was issued by the appellant in discharge of his debt. The said liability by way of debt arose in terms of the transactions. For proving the said transactions, the second respondent filed books of accounts. The books of accounts maintained by the second respondent were found to be not reflecting the correct state of affairs. A discrepancy of more than Rs.14,00,000/- was found.
It was for the appellant only to discharge the initial onus of proof. He was not necessarily required to disprove the prosecution case. Whether in the given facts and circumstances of a case, the initial burden has been discharged by an accused would be a question of fact. It was a matter relating to appreciation of evidence. The High Court in its impugned judgment did not point out any error on the part of the appellate court in that behalf.
What would be the effect of a presumption and the nature thereof fell for consideration before a Full Bench of the Andhra Pradesh High Court in G.Vasu Vs. Syed Yaseen Sifuddin Quadri [AIR 1987 AP 139 : 1987 (1) An LT 1 (FB)]. In an instructive judgment, Rao, J, (as His Lordship then was) speaking for the Full Bench noticed various provisions of the Evidence Act as also a large number of case-laws and authorities in opining :
"From the aforesaid authorities, we hold that once the defendant adduces evidence to the satisfaction of the court that on a preponderance of probabilities there is no consideration in the manner pleaded in the plaint or suit notice or the plaintiff's evidence, the burden shifts to the plaintiff and the presumption 'disappears' and does not haunt the defendant any longer."
It was further held :
"For the aforesaid reasons, we are of the view that where, in a suit on a promissory note, the case of the defendant as to the circumstances under which the promissory note was executed is not accepted, it is open to the defendant to prove that the case set up by the plaintiff on the basis of the recitals in the promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption under Section 118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all conceivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words 'until the contrary is proved' in Section 118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has to option to ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'."
The learned counsel for the respondent relying on CDJ 2007 SC 214 (S.Kamala Vs. M.J.Vidyadharan & Another), would contend that "if there are two views are possible, the High Court while exercising its appellate power against the judgment of acquittal, shall not ordinarily interfere therewith". The learned trial Judge after coming to a definite conclusion that since the complainant has failed to discharge his initial burden as contemplated under Section 138 of the Negotiable Instruments Act, cannot seek any remedy under Section 138 of the Negotiable Instruments Act against the accused, has dismissed the petition thereby acquitting the accused under Section 255(1) of Cr.P.C. I do not find any reason to interfere with the well considered Judgment of the learned trial Judge in C.C.No.317 of 1998 on the file of the Court of Judicial Magistrate No.I, Coimbatore, which is neither infirm nor illegal to warrant any interference from this Court. Point is answered accordingly.

7.In fine, the appeal fails and the same is hereby dismissed confirming the Judgment in C.C.No.317

of 1998 on the file of the Court of Judicial Magistrate No.I, Coimbatore.

30.10.2008

Index :Yes/No
Web :Yes/No
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To,
1.The Judicial Magistrate No.I,
Coimbatore.

2.-do- the Chief Judicial Magistrate,
Coimbatore.

A.C.ARUMUGAPERUMAL ADITYAN, J.

ssv

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